Sup... U.S.
FILED

(1) 02 1344 FEB 24 2003

No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANTONIO VINCENTE DIAS,

Petitioner,

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KEVIN LAWRENCE BARRON
DENNER-SAYEG, LLP
Suites 3501-3506
Four Longfellow Place
Boston, Massachusetts 02114
(617) 227-2800

Counsel for Petitioner

Dated: February 24, 2003

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

22 pp

QUESTION PRESENTED

Whether retroactive application of the repeal of the discretionary waiver of deportation (Immigration and Nationality Act §212(c) to immigrants convicted at trial fundamentally disrupts the reliance interest of such immigrants; in other words, whether the protections of this Court's decision in *St. Cyr v. INS* (discussed, *infra*) should not extend equally to those immigrants who chose a trial over a negotiated disposition in the belief that a conviction would not lead to mandatory deportation?

LIST OF PARTIES

All the parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 6

CONCLUSION 7

INDEX OF APPENDICES:

APPENDIX A - Decision of the Court of Appeals 1a

APPENDIX B - Decision of the Immigration Board of Appeals 3a

TABLE OF AUTHORITIES

CASES:

United States Supreme Court

INS v. St. Cyr, 583 U.S. 289 (2001) 5, 6, 7

Landsgraf v. USI Film Products,
511 U.S. 244 (1994) 7

Courts of Appeals

Antonio Vincente Dias v. Immigration & Naturalization Service, _____F.3d ____
(1st Cir. 2002) 1

U.S. CONSTITUTION

Article I, §9, Cl. 3 1

Fifth Amendment 2

STATUTES

8 U.S.C. §1229b(a)(3) 5

28 U.S.C. §1254(1) 1

Immigration and Nationality Act, §212 (c);
8 U.S.C. §1182(c) 2, 5, 6, 7

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, §404(d) 3, 5, 7

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, §401 3

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104 - 208, §304(b) 4

Massachusetts General Laws c. 94C, §§32C 4

Massachusetts General Laws c. 94C, §40 ..... 4N

RULES

Supreme Court Rules, Rule 10(c) 6

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit appears at Appendix A to this petition and is reported at *Antonio Vincente Dias v. Immigration & Naturalization Service,* _____F.3d ____ (1st Cir. 2002).

The July 31, 2002 decision of Board of Immigration Appeals appears at Appendix B to this petition.

JURISDICTION

The United States Court of Appeals for the First Circuit entered its decision on November 27, 2002. No petition for rehearing was filed in this case.

Petitioner, Antonio Vincente Dias, invokes the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, §9 of the United States Constitution: "No Bill of Attainder or *ex post facto* Law shall be passed."

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Up through the time of petitioner Dias' conviction, the applicable "discretionary waiver of deportation" was contained in the Immigration and Nationality Act, §212 (c) also 8 U.S.C. §1182(c)(both now repealed):

> Non-applicability of subsection (a). Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted

> in the discretion of the Attorney General without regard to the provisions of subsection (a)(other than paragraphs (3) and (9) (C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211 (b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and served for such felony or felonies a term of imprisonment of at least five years.

The following relevant portions of The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, §404(d) came into effect over one year after petitioner Dias' conviction:

> (d) Classes of Excludable Aliens.-- Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended-- (1) by striking "The first sentence of this" and inserting "This"; and (2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which

both predicate offenses are covered by section 241(a)(2)(A)(i).

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104 - 208, §304 (b) repealed the 212(c) discretionary waiver more than a year after petitioner's conviction as follows: "(b) REPEAL OF SECTION 212(c).-Section 212(c) (8 U.S.C. 1182(c)) is repealed."

STATEMENT OF THE CASE

Mr. Dias, a lawful permanent United States resident, was convicted after a trial of possession of marihuana with intent to distribute, a criminal charge that made him deportable. The offense, codified in the Massachusetts General Laws at c. 94C, §32C, carried a maximum penalty of two years' incarceration in the county jail.*

Mr. Dias was given a one-year sentence on September 26, 1995. He would have been eligible for a waiver of deportation under the immigration

---

* The criminal action involved other charges that did not affect the calculus of Mr. Dias' decision to go to trial. Mr. Dias was also charged with an offense called "Drug Violation Near School Zone or Park" that carried a potential 15-year penalty, but not as charged and tried in the District Court Department where the maximum penalty to impose was 2 & 1/2 years. The District Court vacated Mr. Dias conviction on this offense when it granted certain post-trial motions. Mr. Dias was also acquitted of a companion conspiracy charge (M.G.L. c. 94C, §40) that carried the same penalty as the possession with intent to distribute charge.

law in effect when he was convicted, but his removal proceedings were commenced after AEDPA's and IIRIRA's effective dates.

Mr. Dias would have been eligible for the waiver regardless whether he pled guilty or was found guilty after a trial. In order to best protect his immigration status, therefore, Mr. Dias' rational choice was to elect a trial at which he could be acquitted. In contradistinction to *Cyr, infra,* Mr. Dias' decision to try his case instead of making a plea bargain was not driven by the need to remain eligible for a discretionary waiver or deportation; rather, it was supported by the expectation that he would remain eligible regardless of outcome.

Before the effective dates of the AEDPA and the IIRIRA, §212(c) of the Immigration and Nationality Act of 1952 was interpreted to give the Attorney General broad discretion to waive deportation of resident aliens. The class of aliens depending on §212(c) relief was reduced in 1996 by §401 of AEDPA, which identified a broad set of offenses for which convictions would preclude such relief; and by IIRIRA, which repealed §212(c) and replaced it with a new section excluding from the class anyone "convicted of an aggravated felony," 8 U.S.C. §1229b(a)(3).

REASONS FOR GRANTING THE PETITION

Important Question Not Settled/ Decision in Conflict

The First Circuit's judgment below reaches an important question of federal law that has not been, but should be, settled by this Court or has decided an important federal question in a way that conflicts with the relevant decisions of this Court. Rule 10 (c), Supreme Court Rules.

The INS applies the repeal of §212(c) relief retroactively in a way that will substantially and fundamentally alter the immigration consequences of an accused immigrant's decision to elect a trial. Before the repeal of §212(c), petitioner Dias' most prudent course for protecting his immigration status was to take his case to trial. That choice was anchored in the belief that he was preserving his eligibility to stay in the United States. If he won, there was no conviction on which to deport him; if he lost, a §212(c) waiver remained available since the maximum penalty did not exceed five years. The decision to elect a trial, therefore, was based on a fundamental reliance interest in the availability of relief from deportation. *See, INS v. St. Cyr,* 583 U.S. 289 (2001). *St. Cyr* acknowledged that the alien defendant's decision to accept a plea bargain and sentence of less than five years was driven by the alien's desire to protect his immigration status; the interest was one protected by "familiar considerations of fair notice, reasonable reliance, and settled

expectations." *St. Cyr, supra* at ____, citing *Landsgraf v. USI Film Products,* 511 U.S. 244, 270 (1994). An alien tried and convicted (before the effective dates of the AEDPA and the IIRIRA) of an offense carrying a maximum imprisonment penalty of two years (such as the petitioner) should be afforded no less protection against retroactive and *ex post facto* laws than an alien pleading guilty to a greater offense and receiving a higher penalty.

The rationale of *St. Cyr* applies equally to persons convicted on plea or verdict of crimes for which a discretionary waiver was available. Retroactive application of AEDPA and IIRIRA is improper in either event because: (1) Congress failed to direct with requisite clarity that the law applied retroactively; and (2) such an application would have a genuine retroactive effect, i.e., it attaches a new disability to an alien who entered a guilty plea *or went to trial* with the expectation that he would be eligible for § 212(c) relief. *St. Cyr,* 533 U.S. *supra* at 314-25 citing *Landsgraf v. USI Film Products,* 511 U.S. 244 (1994).

CONCLUSION

For the reasons set forth above, this Court should grant petitioner's request for writ of certiorari to the United States Court of Appeals for the First Circuit.

Dated this 24th day of February, 2003 at Boston, Massachusetts.

Respectfully submitted,

KEVIN LAWRENCE BARRON
453 Washington Street #5B
Boston, Massachusetts 02111-1325
617 482-6368

Of Counsel to
DENNER-SAYEG, LLP
Attorneys for the Petitioner
ANTONIO VINCENTE DIAS
4 Longfellow Pl. - Suites 3501-3506
Boston, Massachusetts 02114
617 227-2800

INDEX OF APPENDICES

Appendix A

Decision of the Court of Appeals 1a

Appendix B

Decision of the Immigration Board of Appeals 3a

APPENDIX A

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: Jul 31, 2002

File: A36-201-682-Boston

In re: DIAS, ANTONIO VICENTE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Vaziri, Emili

ORDER:

PER CURIAM. While the appeal has been pending, the United States Supreme Court determined that the restrictions on section 212(c) relief do not apply retroactively to aliens who entered into a plea agreement prior to April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. *See INS v. St. Cyr*, 533 U.S. 289 (2001). However, this alien is not aided by the Supreme Court's *St. Cyr* ruling. The record reflects that the respondent is not

eligible for section 212 (c) relief because the alien did not enter into a plea agreement, but rather was tried and found guilty of the crime which provides the basis for these proceedings. Accordingly, the appeal is dismissed.

/s/_____
FOR THE BOARD

APPENDIX B

United States Court of Appeals

For the First Circuit

No. 02-2074

ANTONIO VICENTE DIAS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

Before
Lynch, Circuit Judge,
Cyr, Senior Circuit Judge,
and Lipez, Circuit Judge.

Joseph F. Dugan on Petition for Review of an Order of The Board of Immigration Appeals for petitioner.

Robert D. McCallum, Jr., Assistant Attorney General, Civil Division, Christopher C. Fuller, Senior Litigation Counsel, Office of Immigration Litigation, and Brenda M. O'Malley, Trial Attorney, Office of Immigration Litigation, Civil Division, Department of Justice, on Respondent's Motion to Dismiss Petition for Review for Lack of Jurisdiction and Opposition to Petitioner's Motion for a Stay of Removal for respondent.

November 27, 2002

Per Curiam. In 1995, petitioner Dias was convicted in the trial court for the Commonwealth of Massachusetts of a violation of the drug laws of that state. At the time of the conviction, petitioner was eligible for a discretionary waiver of deportation pursuant to former § 212(c) of the Immigration and Nationality Act. In 1996, § 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA) restricted the availability of § 212(c) relief for aliens convicted of a number of felonies, including petitioner's controlled substance offense.

The issue presented by this petition for review is whether application of the new law to petitioner would have an impermissible retroactive effect. Relying on INS v. St. Cyr, 533 U.S. 289 (2001), petitioner argues that it would. In St. Cyr, the Court held that, because new legal consequences would attach to events completed before its enactment, application of AEDPA to alien criminal defendants who pled guilty prior to AEDPA would

constitute an "impermissible retroactive effect." Id., at 321. However, the decision in St. Cyr relied on the Court's recognition that (1) plea agreements generally involve a quid pro quo between a defendant and the government and (2) that aliens often attach much importance to the immigration consequences of the decision whether or not to enter into an agreement. "Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." St. Cyr, 533 U.S. at 322 (citation omitted). Therefore, the potential for unfairness to one who pled guilty in reliance on immigration law as it existed at the time of the plea would be significant if the new law were applied retroactively. For this reason, the Court held that alien criminal defendants who pled guilty prior to AEDPA are eligible to apply for discretionary relief under former § 212(c) of the INA.

In contrast, those alien criminal defendants who chose to go to trial, prior to the change wrought by AEDPA, were not relying on immigration law as it existed at the time in making that decision. The inquiry into retroactive application of a statute requires a "commonsense, functional judgment" about the new legal consequences that attach to events completed before its passage. St. Cyr, 533 U.S. at 321.

Although predating St. Cyr, our decision in Mattis v. Reno, 212 F.3d 31 (1st Cir. 2000), foreshadowed the correct outcome of this case. In Mattis we

held that the retroactivity analysis must include an examination of reliance in a guilty plea situation. It follows that, having been convicted after a trial where there was not, and could not have been, reliance by the defendant on the availability of discretionary relief, Dias may not argue that the statute has impermissible retroactive effect as to him.

We now join the Seventh and Ninth Circuits in ruling that application of the new statutory limitations on discretionary relief does not have an impermissible retroactive effect on those aliens who would have been eligible for discretionary relief when they were convicted of a felony after trial. See Armendariz v. Sonchik, 291 F.3d 1116, 1121 (9th Cir. 2002)("aliens who elected a jury trial cannot plausibly claim that they would have acted any differently if they had known about § 440(d)"); LaGuerre v. Reno, 164 F.3d 1035, 1041 (7th Cir. 1998).

Affirmed.

(2)

Supreme Court, U.S.
FILED
MAY 14 2003
OFFICE OF THE CLERK

No. 02-1344

In the Supreme Court of the United States

ANTONIO VINCENTE DIAS, PETITIONER

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
DONALD E. KEENER
MICHELLE E. GORDEN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

14 pp

QUESTION PRESENTED

Whether, under the rule of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), certain 1996 amendments to the immigration laws, which rendered aggravated felons such as petitioner statutorily ineligible for discretionary waivers of deportation under 8 U.S.C. 1182(c) (1994), are inapplicable to petitioner, who did not enter a guilty plea, but instead was convicted of an aggravated felony after a jury trial.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Armendariz-Montoya v. *Sonchik*, 291 F.3d 1116 (9th Cir. 2002), petition for cert. pending, No. 02-1273	5, 6
Chambers v. *Reno*, 307 F.3d 284 (4th Cir. 2002)	6
INS v. *St. Cyr*, 533 U.S. 289 (2001)	3, 5, 6, 7, 8
LaGuerre v. *Reno*, 164 F.3d 1035 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000)	5-6
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994)	7
Landon v. *Plasencia*, 459 U.S. 21 (1982)	4
Lara-Ruiz v. *INS*, 241 F.3d 934 (7th Cir. 2001)	6
Rankine v. *Reno*, 319 F.3d 93 (2d Cir. 2003)	6

Statutes and regulations:

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214	3
§ 440(d), 110 Stat. 1277	3, 4, 5
Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2))	2
Illegal Immigration Reform and Immigrant Responsibility Act of 1966, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546	4
§ 304(a):	
110 Stat. 3009-587 to 3009-593	4
110 Stat. 3009-594 to 3009-597	4
§ 309(a), 110 Stat. 3009-625	4

Statutes and regulations—Continued: Page

§ 309(c), 110 Stat. 3009-625 to 3009-627 4
8 U.S.C. 1101 4
8 U.S.C. 1101(a)(43) 4
8 U.S.C. 1101(a)(43)(B) 2
8 U.S.C. 1101 note 4
8 U.S.C. 1182 (1994) 4
8 U.S.C. 1182 4
8 U.S.C. 1182(c) (1994) 3, 4, 5, 6, 8, 9
8 U.S.C. 1227(a)(2)(A)(iii) 2, 4
8 U.S.C. 1227(a)(2)(B)(i) 2
8 U.S.C. 1229 4
8 U.S.C. 1229a 4
8 U.S.C. 1229b 4
8 U.S.C. 1229b(a) 7
8 U.S.C. 1229b(b) 7
8 U.S.C. 1251 (1994) 4
8 U.S.C. 1251(a)(2)(A)(iii) (1994) 4
8 U.S.C. 1252(b)(3)(A) 2
8 C.F.R. Pt. 1001 *et seq.* 2

In the Supreme Court of the United States

No. 02-1344

ANTONIO VINCENTE DIAS, PETITIONER

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-6a) is reported at 311 F.3d 456. The administrative decision of the Board of Immigration Appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2002. The petition for a writ of certiorari was filed on February 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Portugal who was admitted to the United States in 1979 as a lawful

permanent resident. In September 1995, petitioner was convicted after a jury trial of possessing marijuana with intent to distribute it, in violation of Massachusetts law. He was sentenced to a term of imprisonment of one year. Pet. 4; Pet. App. 4a; Gov't C.A. Mot. to Dismiss 1; Pet. C.A. Stay Mem. 1-2.

In February 1999, based on the marijuana-distribution conviction, the Immigration and Naturalization Service (INS) charged petitioner with being removable from the United States as an alien convicted of an aggravated felony and a controlled substance violation. Gov't C.A. Mot. to Dismiss 1; see 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii) and (B)(i).[1] In administrative removal proceedings before an immigration judge (IJ), petitioner argued that he should not be removed from the United States because his marijuana-distribution conviction had been vacated. IJ Oral Dec. 2. In April 2001, the IJ determined that the conviction had not been vacated, and ordered petitioner removed to Portugal. *Id.* at 3-4.

2. In his administrative appeal to the Board of Immigration Appeals (BIA), petitioner argued, *inter alia*,

---

[1] On March 1, 2003, functions of several border and security agencies, including certain functions of the former INS, were transferred to the Department of Homeland Security and assigned to its Bureau of Immigration and Customs Enforcement. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)). The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. See 8 C.F.R. Pt. 1001 *et seq.* (Justice Department implementing regulations as recodified after Homeland Security Act). Before the reorganization, the INS was named as the respondent in the court of appeals and this Court. The correct respondent was, and is, the Attorney General of the United States. See 8 U.S.C. 1252(b)(3)(A).

that he should be allowed to apply for a discretionary waiver of deportation under 8 U.S.C. 1182(c) (1994) and *INS* v. *St. Cyr*, 533 U.S. 289 (2001). See Pet. BIA Br. 1-2.

Before the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, the Attorney General was authorized under former Section 1182(c) to provide discretionary relief from deportation to aliens lawfully admitted for permanent residence.[2] To be eligible for such relief, the alien had to show that he had maintained a lawful, unrelinquished domicile in this country for seven years. The final sentence of Section 1182(c) provided, however, that the Attorney General's discretionary authority "shall not apply" to an alien who had been convicted of an aggravated felony and had served a term of imprisonment of at least five years for such an offense. 8 U.S.C. 1182(c) (1994).

On April 24, 1996, AEDPA became law. Section 440(d) of AEDPA amended the final sentence of Section 1182(c) to provide that the Attorney General's authority to grant relief under Section 1182(c) "shall not apply" to a broader class of aliens, including all aliens

---

[2] Section 1182(c) provided that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General" without regard to certain grounds of exclusion. 8 U.S.C. 1182(c) (1994). Although Section 1182(c) by its terms authorized only the admission of certain lawful permanent resident aliens who otherwise would have been excludable upon returning to the United States, deportable aliens (who had achieved entry into the United States) were allowed to apply for discretionary relief from deportation under that provision. See *St. Cyr*, 533 U.S. at 295.

who were deportable because they had been convicted of aggravated felonies. See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (recodified as 8 U.S.C. 1227(a)(2)(A)(iii))); see also 8 U.S.C. 1101(a)(43) (defining "aggravated felony").

In September 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Section 304(a) of IIRIRA (110 Stat. 3009-594 to 3009-597) repealed 8 U.S.C. 1182(c) (1994) and replaced it with current 8 U.S.C. 1229b, which makes permanent resident aliens who have been convicted of an aggravated felony categorically ineligible for discretionary relief from removal. New Section 1229b generally does not apply to immigration proceedings commenced before April 1, 1997. See IIRIRA § 309(a) and (c) (110 Stat. 3009-625, 3009-625 to 3009-627, reproduced in 8 U.S.C. 1101 note).[3]

In June 2001, this Court issued its decision *St. Cyr*. The Court held that Congress's elimination of the possibility of a discretionary waiver of deportation under 8 U.S.C. 1182(c) (1994) does not apply retroactively to

---

[3] Before IIRIRA, aliens subject to removal from the United States were divided into two statutory categories. Aliens seeking admission and entry into the United States were "excludable." See *Landon* v. *Plasencia*, 459 U.S. 21, 25 (1982); 8 U.S.C. 1182 (1994). Aliens who had gained lawful admission to the United States or entered without permission were deportable. See 8 U.S.C. 1251 (1994). IIRIRA replaced the category of "excludable" aliens with the new category of "inadmissible" aliens, consisting of aliens who are not eligible for admission into the United States. See 8 U.S.C. 1182. In Section 304(a) of IIRIRA, 110 Stat. 3009-587 to 3009-593, Congress instituted a new form of proceeding, known as "removal," that applies to inadmissible aliens as well as deportable aliens. See 8 U.S.C. 1229, 1229a.

alien aggravated felons *who pleaded guilty* before the effective date of that repeal and who would have been eligible for a discretionary waiver of deportation, despite their convictions, at the time of their criminal pleas. 533 U.S. at 314-326.

On July 31, 2002, the BIA dismissed petitioner's appeal. The BIA determined that petitioner "is not aided by the Supreme Court's *St. Cyr* ruling" because he "did not enter into a plea agreement, but rather was tried and found guilty of the crime which provides the basis for [his removal]." Pet. App. 1a, 2a.

3. The Court of Appeals for the First Circuit upheld the BIA's decision in a per curiam opinion. Pet. App. 3a-6a. The court explained that "the decision in *St. Cyr* relied on the Court's recognition that (1) plea agreements generally involve a quid pro quo between a defendant and the government and (2) that aliens often attach much importance to the immigration consequences of the decision whether or not to enter into an agreement." *Id.* at 5a. The court of appeals distinguished between the situation of aliens who entered a guilty plea before AEDPA, who often may have relied, when pleading guilty, on their eligibility to be considered for a waiver of deportation under 8 U.S.C. 1182(c) (1994), and the situation of aliens like petitioner who instead went to trial. The panel concluded that aliens who proceeded to trial are not entitled to the benefit of *St. Cyr* because they "were not relying on immigration law as it existed at the time in making that decision." Pet. App. 5a. Thus, the court concluded that applying AEDPA Section 440(d) and IIRIRA to such aliens is not impermissibly retroactive under *St. Cyr*. *Id.* at 6a (citing *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), petition for cert. pending, No. 02-1273), and *LaGuerre* v. *Reno*, 164 F.3d 1035,

1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000)). The court therefore affirmed the BIA's rejection of petitioner's application for relief under former Section 1182(c). *Ibid.*

ARGUMENT

The question presented by the petition is whether the retroactivity rule of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), should be extended to an alien aggravated felon who was convicted after a jury trial before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, and who would have been eligible at the time of his conviction to be considered for a waiver of deportation despite the conviction. The decision below correctly resolved that issue and there is no conflict with any decision of this Court or any other court of appeals. This Court's review accordingly is not warranted.

Every court of appeals that has considered the question after *St. Cyr* has concluded that the 1996 immigration amendments do not operate in a retroactive fashion when they are applied to disqualify an alien such as petitioner from being considered for a waiver of deportation because of his conviction of an aggravated felony *after a trial*. See Pet. App. 6a; *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir. 2003); *Chambers* v. *Reno*, 307 F.3d 284, 289-293 (4th Cir. 2002); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), petition for cert. pending, No. 02-1273; see also *Lara-Ruiz* v. *INS*, 241 F.3d 934, 945 (7th Cir. 2001) (reaching same conclusion before *St. Cyr*).

Those uniform decisions of the courts of appeals are correct and consistent with *St. Cyr*. *St. Cyr* addressed only the situation of aliens whose criminal convictions "were obtained through plea agreements" before the

1996 immigration amendments. 533 U.S. at 326. The Court reasoned that the 1996 immigration amendments that have rendered waivers of deportation unavailable to aggravated felons and certain other criminal aliens, see generally 8 U.S.C. 1229b(a) and (b), should not be applied to that class of criminal aliens because that would "attach[] a new disability" in respect to pre-AEDPA guilty pleas. 533 U.S. at 321 (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269 (1994)) (internal quotation marks omitted). The Court emphasized that "[p]lea agreements involve a *quid pro quo* between a criminal defendant and the government," *ibid.*, by which the defendant waives constitutionally guaranteed rights and provides a benefit to prosecutors and the criminal justice system, *id.* at 322. Furthermore, the Court concluded that "as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions," including the possibility of ineligibility for discretionary relief from deportation. *Ibid.* Indeed, the Court determined that, before 1996, "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial," *id.* at 323, which "almost certainly" influenced their decision to accept a plea, *id.* at 325.

None of those considerations applies to aliens, like petitioner, who proceeded to trial. Those aliens did not provide the government a *quid pro quo*, but rather asserted their constitutional right to a trial and required the government to expend prosecutorial and judicial resources to obtain a conviction. Moreover, there is no basis for supposing that aliens who went to trial generally were motivated by a desire to obtain

immigration benefits. Aliens who proceeded to trial before the 1996 immigration amendments commonly did so *despite* the immigration laws that were in effect at that time. Often, such aliens would have risked losing immigration benefits if they went to trial, because they could receive and serve a sentence of five years or more after the trial and thereby be rendered ineligible for relief under 8 U.S.C. 1182(c) (1994). See p. 3, *supra*; *St. Cyr*, 533 U.S. at 323 (discussing case of alien who pursued plea agreement to avoid risk of losing waiver eligibility after trial).

Petitioner does not suggest that he actually rejected a plea offer. See Pet. C.A. Stay Mem. 4 (arguing that if petitioner had known that a conviction after trial could result in removal, "this might have led him to seek a plea bargain resulting in his pleading to non-aggravated offense"). Nevertheless, petitioner asserts (Pet. 6) that his decision to go to trial was "anchored in" pre-AEDPA immigration law. Petitioner reasons that "[i]f he won, there [would have been] no conviction on which to deport him; if he lost, a [Section 1182(c)] waiver remained available" because the maximum authorized sentence for his crime was less than five years. Pet. 6; Pet. 4 & n.*.

Under the facts stated by petitioner, the potential availability of a waiver of deportation should not have had any bearing upon petitioner's decision to go to trial. If petitioner could not have been sentenced to five years' imprisonment in his state trial, then he would have been eligible to be considered for a waiver of deportation under former Section 1182(c) *regardless of the outcome of his criminal proceeding.* When an alien proceeds to trial under circumstances like those of petitioner's case, it is reasonable to assume that he did so because he believed that the government could not

prove its case or because he was unable to reach a plea agreement that was sufficiently favorable overall, not because of immigration concerns that were immaterial at the time. Nothing in *St. Cyr* suggests that the retroactivity rule of that case would apply in such circumstances.

Furthermore, and despite the argument discussed above, petitioner indicates that he was tried on three separate state charges, each of which carried a maximum sentence of either two years' or two and a half years' imprisonment. Pet. 4 & n.*. If petitioner had been convicted of all three charged offenses, and if sentencing to consecutive prison terms was possible in petitioner's case, then his total sentence could have been longer than six years. Accordingly, the facts stated by petition suggest that his decision to go to trial could have had the consequence of rendering him *ineligible* to be considered for a waiver of deportation under 8 U.S.C. 1182(c) (1994), regardless of the later immigration amendments that denied waiver-eligibility to all aggravated felons. That apparent disregard for the immigration consequences of going to trial would be an additional reason why the considerations of *St. Cyr* do not apply to petitioner's case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
DONALD E. KEENER
MICHELLE E. GORDEN
Attorneys

MAY 2003